In the Supreme Court

OF THE

United States

Supreme Court, U. S.
FILED
OCT 23 1944
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

No. 624

H. M. LORBER, ROY R. DEMPSTER, J. R. MASON, ARTHUR LORBER, FRANCES V. WHEELER, GILBERT MOODY, J. B. BLOOM, as Trustee of the Bloom Company, a Trust Estate, and STANLEY W. LANDIS,
Petitioners,

vs.

VISTA IRRIGATION DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

W. COBURN COOK,
Berg Building, Turlock, California,
Counsel for Petitioners.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Page

Petition for Writ of Certiorari..... 1

Opinion Below 2

Jurisdiction 2

Statutes Involved 2

Summary Statement of the Matter Involved..... 3

Questions Presented 5

Reasons for Granting Writ of Certiorari..... 6

Brief in Support of Petition for Writ of Certiorari..... 9

Factual Background of the Case..... 9

Argument 19

First Point and Second Point: I. Where the state court, in its judgment rendered November 29, 1937, directed public officials of the state to make annual direct ad valorem tax levies for the discharge of a public debt, and specifically retained jurisdiction of the cause for the purpose of requiring the officials to levy and collect the taxes, is not a bankruptcy decree which restrains and annuls enforcement of that judgment, an interference with the governmental and political affairs of the state, prohibited by Section 83(c) of the Bankruptcy Act?..... 19

II. Where the state court in 1937 determined the relationship of the R.F.C. to the bankrupt and to the petitioners by final judgment, and therein determined the R.F.C. holds the original bonds "as collateral security for a loan" and that the loan has been paid as to all obligations up to January 1, 1937, and that the district has funds to pay its debts, is not the plea of res judicata available in a bankruptcy court so as to limit the claim of the R.F.C. to the amount of the loan, and to make its consent as holder for full face value of the original obligation a nullity? 19

Third Point: Where the original creditors surrendered their bonds for the account or order of the bankrupt upon payment being received from funds loaned by the

Page

R.F.C., are not the original securities owned and held by the bankrupt, so as to prevent their being counted in the consent, especially in view of the plea of res judicata? 20

Fourth Point: Is a plan of composition fair where lands within the taxing agency have on the market values vastly in excess of the debt, where the taxpayers have independent means and the evidence shows a steady great increase in population? 21

Fifth Point: Is a plan of composition fair which allows one creditor 100% of his investment in bonds bearing interest at 4%, which bonds are very desirable security on the present day market, while it requires petitioners to surrender their bonds and take cash?..... 22

Sixth Point: Where the bankrupt borrowed money from the R.F.C. on the security of original bonds representing the indebtedness to be composed, and during the proceedings but before the interlocutory decree became final, the bankrupt paid the R.F.C. in full and liquidated the original indebtedness with new money borrowed from private bankers, is not the case moot, and is there not a failure of consent of the majority bondholders, and should not the whole proceeding be set aside and dismissed? If not dismissed, does not the saving made by the 3¼% bonds belong to the creditors?..... 23

Conclusion 24

Table of Authorities Cited

Cases

	Pages
Adirondack Railway v. New York, 176 U. S. 335	16
Consolidated Rock Co. v. Dubois, 312 U. S. 510	3
Green v. City of Stewart, 135 Fed. (2d) 33	24
Oklahoma v. Texas, 256 U. S. 70	16
Schubert v. Vista Irrigation District (R. 22, 25)	13
State of Texas v. Tobasco Consolidated School Dist., 132 Fed. (2d) 62, 133 Fed. (2d) 196, 142 Fed. (2d) 58	6, 7, 22
U. S. v. Bekins, 304 U. S. 27, 58 S. Ct. 811	16
West Coast Life Ins. Co. v. Merced Irrigation District, 114 Fed. (2d) 654	6, 22
Wright v. Coral Gables, 137 Fed. (2d) 192, affirmed March 13, 1944, 64 S. Ct. 779, 321 U. S. 753	24

Codes and Statutes

Act of June 22, 1938, c. 575, Section 3(b) (52 Stat. 940)	2
Bankruptcy Act of 1898, Chapter IX, as amended (11 U.S.C., Sections 401-404)	3
Bankruptcy Act, Section 83(c)	5
Cal. Stats. 1897, p. 254, as amended (Division 11, Water Code of California, Chap. 368, Cal. Stats. 1943)	3
California Irrigation District Act, Section 39	16
Judicial Code, Section 240(a) (28 U.S.C.A., Sec. 347(a))	2
Municipal Bankruptcy Act of August 16, 1937, c. 657 (50 Stat. 654), 11 U.S.C. 401-404, adding Sections 81-84	2
50 Stat. 654	16
11 U.S.C.A. 403(d)	21

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

H. M. LORBER, ROY R. DEMPSTER, J. R. MASON, ARTHUR LORBER, FRANCES V. WHEELER, GILBERT MOODY, J. B. BLOOM, as Trustee of the Bloom Company, a Trust Estate, and STANLEY W. LANDIS,
Petitioners,

vs.

VISTA IRRIGATION DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision (R. 481) of the Circuit Court of

Appeals for the Ninth Circuit, made in the above entitled cause on June 20, 1944, which denied the motion of petitioners for an order dismissing the proceedings, etc., and affirmed the interlocutory decree of the District Court in favor of the respondent against the appellants, rendered herein (R. 54, 438) on March 6, 1941, amended January 20, 1943. Rehearing denied August 15, 1944. (R. 482.)

OPINION BELOW.

Opinion of Circuit Court of Appeals, 127 Fed. (2d) 628, 143 Fed. (2d) 282.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered June 20, 1944. (R. 481.) The mandate was stayed until disposition of the case by this Court (not in printed record). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code. (28 U.S.C.A., Sec. 347 (a).)

STATUTES INVOLVED.

Municipal Bankruptcy Act of August 16, 1937, c. 657 (50 Stat. 654), 11 U.S.C. 401-404, adding Sections 81-84; and Act of June 22, 1938, c. 575, Section 3 (b). (52 Stat. 940.)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a proceeding brought by the respondent Vista Irrigation District, a California irrigation district and a public corporation and state governmental agency (organized under Cal. Stats. 1897, p. 254, as amended, known as "the California Irrigation District Act", being presently Division 11, Water Code of California, Chap. 368, California Statutes of 1943), for readjustment of its bond obligations under what is now Chapter IX of the Bankruptcy Act of 1898, as amended. (11 U.S.C., Sections 401-404.)

An interlocutory decree confirming the irrigation district's plan of composition was entered by the District Court on March 26, 1941. (R. 53-64.) An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit and that Court affirmed in part (R. 403) and rendered its opinion, 127 Fed. (2d) 628, and remanded the cause for further proceedings on April 16, 1942, on the basis of the decision of this Court in *Consolidated Rock Co. v. Dubois,* 312 U.S. 510, directing the trial Court to make its findings to support the conclusion that the payments provided for in the plan of composition were all that the district could reasonably pay in the circumstances. The lower Court determined that the evidence should bring the case down to date, respecting the tax-collecting ability of the district (R. 406) and the Circuit Court in its opinion appears to have approved this position. (R. 472-474.) The trial Court held its hearing on the remand on July 8, 1942, and thereafter made return of its pro-

ceedings in the Circuit Court in the form of additional findings (R. 432) and an amendment of the decree. (R. 438.)

While the matter was thus pending in the Circuit Court, the petitioners made a motion to dismiss the proceedings (Vol. III, R. 443) on the ground that there was no longer any valid consent to the plan of composition; that the cause had become moot as the original obligations had been entirely discharged; and that the bankrupt had liquidated its indebtedness completely and entirely (R. 443-446), having borrowed new money from a new syndicate and discharged its indebtedness to the Reconstruction Finance Corporation, which agency had made the original refinancing loan (R. 446); and the district had received large financial benefits through this new borrowing for which it had failed to account to its creditors.

The motion was denied. (R. 481.)

A petition for rehearing for clarification of the opinion was presented, and this was denied August 15, 1944. (R. 482.)

The matter involved concerns questions of the plan of composition itself, including in particular a question as to whether only one or all creditors are not entitled to be paid in refunding bonds; a question of the jurisdiction of State Courts; and also the question whether where pending the proceedings the bankrupt entirely liquidates the consenting bonds the bankruptcy proceedings should be dismissed.

QUESTIONS PRESENTED.

I. Where the State Court, in its judgment rendered November 29, 1937, directed public officials of the State to make annual direct *ad valorem* tax levies for the discharge of a public debt, and specifically retained jurisdiction of the cause for the purpose of requiring the officials to levy and collect the taxes, is not a bankruptcy decree which restrains and annuls enforcement of that judgment, an interference with the governmental and political affairs of the State, prohibited by Section 83(c) of the Bankruptcy Act?

II. Where the State Court in 1937 determined the relationship of the R.F.C. to the bankrupt and to the petitioners by final judgment, and therein determined the R.F.C. holds the original bonds "as collateral security for a loan" and that the loan has been paid as to all obligations up to January 1, 1937, and that the district has funds to pay its debts, is not the plea of *res judicata* available in a Bankruptcy Court so as to limit the claim of the R.F.C. to the amount of the loan, and to make its consent as holder for full face value of the original obligation a nullity?

III. Where the original creditors surrendered their bonds for the account or order of the bankrupt upon payment being received from funds loaned by the R.F.C., are not the original securities owned and held by the bankrupt, so as to prevent their being counted in the consent, especially in view of the plea of *res judicata?*

IV. Is a plan of composition fair where lands within the taxing agency have on the market values

vastly in excess of the debt, where the taxpayers have independent means and the evidence shows a steady great increase in population?

V. Is a plan of composition fair which allows one creditor 100% of his investment in bonds bearing interest at 4%, which bonds are very desirable security on the present day market, while it requires petitioners to surrender their bonds and take cash?

VI. Where the bankrupt borrowed money from the R.F.C. on the security of original bonds representing the indebtedness to be composed, and during the proceedings but before the interlocutory decree became final, the bankrupt paid the R.F.C. in full and liquidated the original indebtedness with new money borrowed from private bankers, is not the case moot, and is there not a failure of consent of the majority bondholders, and should not the whole proceeding be set aside and dismissed? If not dismissed, does not the saving made by the 3¼% bonds belong to the creditors?

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. There is a conflict in the decision of the Circuit Courts of Appeals on the question of whether all creditors are not equally entitled to receive refunding bonds where the refinancing loan is made by the R.F.C. In the instant case, and in *West Coast Life Ins. Co. v. Merced Irrigation District,* 114 Fed. (2d) 654, the Court held in the negative, but in the case of *State of Texas v. Tabasco Consolidated Independent*

School District, 132 Fed. (2d) 62, 133 Fed. (2d) 196, 142 Fed. (2d) 58, the Fifth Circuit Court of Appeals held in the affirmative. This divergence of opinion of the Circuit Courts should be disposed of.

2. It is a matter of great public importance to determine whether a public debtor, while in the process of going through bankruptcy, can entirely liquidate its indebtedness but still claim the benefit of the creditor consent and proof which it made at the hearing. It is also of public interest to determine whether or not such a circumstance does not require the dismissal of the entire proceedings. At any rate, the interest saving so made manifestly belongs to the creditors and not to the bankrupt.

3. It is respectfully submitted that while generally the principles to be followed by the lower Courts have been laid down by the Supreme Court, as to the gauge by which the fairness of a plan of bankruptcy of individuals or private corporations is determined, no such general principles have been laid down for municipal bankruptcy proceedings, and where the showing made is of great prosperity, and extremely high valuations and market sales of the property taxed as to shock almost the reason and conscience, is not a case presented that should be inquired into by this Court as to whether or not the basic principles have been followed?

4. This Court should determine, we respectfully submit, that the Bankruptcy Court must not interfere with the process of State Courts in its orders for levy of taxes.

Wherefore, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record of the proceedings in said Court in the case numbered and entitled in its docket as number 9873, H. M. Lorber, Roy R. Dempster, J. R. Mason, Arthur Lorber, Frances V. Wheeler, Gilbert Moody, J. B. Bloom, as Trustee of the Bloom Company, a Trust Estate, and Stanley W. Landis, Appellants, v. Vista Irrigation District, Appellee, and that the decree of said Court be reversed and the said Court by this Court directed to dismiss the bill and grant the motion for dismissal of proceedings, and for such other relief as to this Court may seem proper.

Dated, Turlock, California,
October 16, 1944.

H. M. LORBER, ROY R. DEMPSTER, J. R. MASON, ARTHUR LORBER, FRANCES V. WHEELER, GILBERT MOODY, J. B. BLOOM, as Trustee of the Bloom Company, a Trust Estate, and STANLEY W. LANDIS,
Petitioners.

W. COBURN COOK,
Counsel for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

H. M. LORBER, ROY R. DEMPSTER, J. R. MASON, ARTHUR LORBER, FRANCES V. WHEELER, GILBERT MOODY, J. B. BLOOM, as Trustee of the Bloom Company, a Trust Estate, and STANLEY W. LANDIS,
Petitioners,

vs.

VISTA IRRIGATION DISTRICT,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FACTUAL BACKGROUND OF THE CASE.

Some of the facts are stated under the heading "Summary Statement of the Matter Involved" in the accompanying petition. There is also a statement of

some of the facts in the opinions of the Court below (R. 64, 472), 127 Fed. (2d) 628, 143 Fed. (2d) 282.

The Vista Irrigation District,[1] respondent here, is a state governmental agency organized August 28, 1923 and located in the County of San Diego. It comprises 18,309 acres. (R. 41.) The principal crops of its taxpayers consist of citrus fruits and avocados, although there is a wide variety of other horticultural planting. Many of its residents make their living in San Diego and Los Angeles and commute there over the weekend, maintaining caretakers. They live in the district for residential reasons and not for farming purposes. Even during the depression there has been an uninterrupted tremendous increase in population and building within the district, from 646 homes in 1933 to 1615 homes in 1941.

Despite the slump and the technical default in payment of its obligations, lands have continued to sell in that district at enormous prices. Some 14,600 acres are watered—in other words, have a domestic and irrigation water supply. (R. 41.) Planted avocado groves are worth $200 to $700 an acre (R. 410); Valencias $500 an acre; Lemons $600 to $650. Land has been bought and sold every year. Unimproved land is bringing $500 an acre. (R. 149.) One of the debtor's witnesses put the value of raw land with water at an average of $250 to $300 an acre. (R. 150.) One land company is holding eight tracts of land at $1250 an acre. (R. 153.)

[1]Herein called the "district".

In 1925 the district voted and sold general obligation 6% gold coupon bonds in the amount of $1,700,000 due serially from 1946 to 1965 and bearing six per cent interest. The bonds are non-callable. It will be observed none of these bonds are yet due, so that the technical default was only partial and as to interest, and as a matter of fact the bankruptcy petition failed to allege insolvency or even past due indebtedness. (R. 3.) The district obtained a loan from the R.F.C. in 1935 in the amount of $937,500 to refinance its indebtedness. (R. 4.) In brief, this provided a cash payment of 55 cents on each dollar of bond principal plus a certain adjustment of interest. (R. 10.)

When the first municipal bankruptcy act was held unconstitutional, the district's petition was dismissed and subsequently some of the petitioners here obtained State Court judgments (R. 51) and pleaded them in their answer to the bankruptcy petition. (R. 22, 27, 31.)

The original bondholders through the medium of an escrow agreement (R. 121) delivered their bonds to the bank with instructions "to deliver (the bonds) to the treasurer of said district upon receipt * * *" of the money. (R. 121.) The instructions further recited "it is further understood and agreed that title to the deposited bonds, coupons and/or tokens shall pass from me to Vista Irrigation District, or its order, * * *" It is contended that since this escrow provision was carried out, title to the bonds acquired at the 55 cent figure passed to the district itself, and it thereby became the legal holder, and so could not count such indebtedness as consenting bonds by subse-

quent transfer of the surrendered securities to the R.F.C.

One of the judgments obtained by the petitioners herein contains this adjudication: "That the outstanding bondholders of respondent irrigation district are bondholders holding not to exceed $68,000 of bonds of said district, including those of petitioners, and also the Reconstruction Finance Corporation of the United States, who holds all of the other bonds of said district as collateral security for a loan to said district, and that all amounts due to the Reconstruction Finance Corporation prior to January 1, 1937, have been paid." (R. 30.)

The petitioners own approximately $37,000 principal amount of original 6% bonds. Substantially all the other bonds have been liquidated and under no circumstances could they now be revived. They are cancelled.

None of the original bonds of this district were redeemable and none mature before the year 1946. There has been default only in payment of interest. Interest was paid to January 1, 1933. In 1932 93% of the bondholders voluntarily offered a five year adjustment, reducing bond interest from 6% to 2%. During 1933 to 1938 $190,000 in interest, approximately, was paid. The district erroneously claimed $375,000 of interest unpaid and showed no credit in its calculations for the $120 interest per bond, previously waived. At the time of the hearing in the Court below, the district had available to pay creditors $238,000 in cash, and during the period since getting the R.F.C. loan has made capital investments of $150,000, approximately. If, therefore, $375,000 interest (as a maximum) was in arrears and

the district had expended $150,000 in capital investment, and had on hand $230,000 cash, the Court manifestly erred in ruling the district insolvent or unable to pay its debts.

On the question of tax collections, also, the record shows a most favorable condition. (R. 276-281.) The district has actually collected 7% more than the total taxes which it had levied. Under California law, 15% is levied over and above actual budget requirements in anticipation of tax delinquencies. The district has actually collected 107% of its annual levy.

The testimony of the district's witnesses at the hearing showed the taxable land in the district was currently salable for $500 an acre unimproved, and an asking price of as high as $1250, whereas the total original bonded debt only averaged $92 an acre. The capital investments within the district are approximately $13,500,000. The irrigated land is rich and highly developed, and is also valuable for homesites. The district is clearly neither insolvent nor unable to pay its lawful debts.

The judgment rendered November 29, 1937, in the case of *Schubert v. Vista Irrigation District* (R. 22, 25), adjudged that "there is no other outstanding indebtedness of said respondent district which has matured except only interest due upon bonds of said district amounting to not to exceed $33,000.00, being interest at 6% per annum, which became payable January 1, 1937 and July 1, 1937; that as the respondents have on hand funds available for application to payment in full of the said matured coupons and interest of the petitioners, the respondents be not

required to levy any further assessment during the year 1937." (R. 25.) The bankruptcy petition was filed March 26, 1938. (R. 13.)

In other words, all the district then owed was the 1938 interest. The Bankruptcy Court surely was bound by this judgment and it is *res judicata,* and therefore the finding of the trial judge is incorrect when he decreed that the district is insolvent.

However, approaching the matter from a different angle, the district had on hand December 31, 1938, cash in the amount of $229,830.46. (R. 241.) It has assets consisting of permanent capital improvement by the district in the amount of $1,684,341.35. (R. 394.) It has title to over 900 acres of tax-escheated land of the value of $68,752.78. (R. 277.) Tax certificates owned by the district in the amount of $87,551.12 (R. 273) and receivables on land sale contracts amounting to $33,585.11. (R. 281.) It has expended for new construction the sum of $178,111.33. (R. 244.) It has paid off overlapping bond debt of $17,585.67. (R. 244.) It purchased its own unmatured bonds, using $11,000. (R. 244.)[2]

---

[2]The total current assets which were available to pay the current interest balance, which is claimed to be $375,000 are thus seen to be:

Cash	$229,830.46
Land for sale	68,752.78
Tax sale certificates	87,551.12
Receivables on contracts	33,585.11
New construction	178,111.33
Bonds purchased	11,000.00
Bonds paid off	17,585.67
Total	$626,416.47

This says nothing of taxable land values, or assessment values or capital assets.

The greatest amount lawfully due on the coupons in 6 years from 1933 to 1938 was $185,423.44, this by reason of the fact that 93% of the bondholders had voluntarily waived $120 a bond interest, but if they had not waived this amount the total interest would have been $375,000 and the district would still have been perfectly solvent. The Court found the bond interest of 1933-38 to be $375,143.44 and it has already been pointed out that the bonds all mature from and after 1946. (R. 43.) The assessed value of the taxable real property in the district is $2,022,069.20. (R. 290.) It has invested $1,851,000 in physical utilities, water pipelines, buildings, reservoirs and equipment. (R. 304.) It has a surplus of $737,000 (R. 304) and the real property within the district is appraised at $13,435,821.55. (R. 395.)

For the years 1931 to 1938, the tax delinquency, after applying credit for the tax certificates sold or redeemed and tax-escheated property resold was only 8.29%, whereas the state law makes it mandatory for the district to levy $115 as taxes for every $100 required by the annual budget, so that during the years 1931 to 1938 the district actually collected 7% more money than its actual budget called for.

The district renegotiated its water contract and thereby affected a saving of $659,399.12. (R. 296.) The delinquency in the collection of water tolls is only 1.7%. (R. 299, 301.) Only $20,000 a year will be needed in the way of capital investment to put and keep the entire water distributing system of the district into first-class shape. (R. 299, 436.)

Certain judgments were obtained by the petitioners. One of these (R. 23) dated November 29, 1937, adjudged that there was no other outstanding indebtedness of the district except $2640 due petitioners and $33,000 or less as bond interest for 1937, and that the district then had funds available to pay its default in full. The judgment then adjudged that the district and its officers "in the year 1938 and each year thereafter, all as provided in Section 39 of the California Irrigation District Act, levy an assessment upon all the lands within the boundaries of the Vista Irrigation District,". The Court issued a peremptory writ of mandate and adjudged "that the court retain jurisdiction of this case for the purpose of requiring the respondents or their successors in office to levy and collect the assessments herein provided and to pay the same to petitioners or their assigns". The petitioners contend that the matters adjudged in this case are of such scope as to establish proof of solvency and to prevent this Court, the Bankruptcy Court, from interfering with the governmental and political affairs of the state where exercised through the State Court rendering this decision. (*U. S. v. Bekins,* 304 U. S. 27, 58 S. Ct. 811; *Oklahoma v. Texas,* 256 U. S. 70; *Adirondack Railway v. New York,* 176 U. S. 335.) When the judgment in question was rendered November 29, 1937 (R. 27) the present amended municipal bankruptcy act was in effect (August 16, 1937) (50 Stat. 654), and the plan had long been proposed and largely carried out. How can the Court below annul that State Court judgment?

For detailed facts and figures evidencing the solvent and flourishing condition of this district, see the bond circular of the bankers who recently sold the new 3¼% refunding bonds. (R. 451-456.)

The case was reheard by the trial judge after remand on December 8, 1942 and certain evidence brought down to date. The district judge made findings supporting his conclusion that 55 cents is all the district court "reasonably be expected to pay". The cause was then certified back to the Circuit Court of Appeals.

During the interim, however, and outside of and undisclosed to the Court, the district accepted an offer for new refunding 3¼% bonds in the amount of $780,000, due serially from January 1, 1944 to January 1, 1971, and sold these 3¼% bonds to Blyth & Co., Stone and Youngberg, and other underwriters, which in turn sold the 3¼% bonds above par and accrued interest, and with the proceeds of this new 3¼% bond issue and certain other funds the respondent liquidated and entirely paid off the R.F.C. by paying the R.F.C. $651,527.54, thus retiring and cancelling the original bond indebtedness upon the existence of which the bankruptcy proceeding depended. No reservations of any kind were made. The consenting bond debt was simply wiped out and new 3¼% bonds issued in the amount of $780,000. (R. 448.)

The plan of composition provided for 4% refunding bonds in the amount of $937,500, to be issued to the R.F.C. (R. 9.) The refunding bond issue is at 3¼%, and the R.F.C. did not get any bonds.

The plan was abandoned by respondent. The old debt is refunded and is liquidated. The consent of bondholders to the plan of composition, the only foundation for the consent, is completely liquidated and wiped out. The whole proceeding is now moot. In the light of this state of affairs, the petitioners made a motion before the Circuit Court of Appeals requesting dismissal of the whole proceeding. (R. 443.) This motion was denied.

The interlocutory decree was confirmed.

Our petition for a rehearing was denied.

ARGUMENT.

FIRST POINT AND SECOND POINT: I. WHERE THE STATE COURT, IN ITS JUDGMENT RENDERED NOVEMBER 29, 1937, DIRECTED PUBLIC OFFICIALS OF THE STATE TO MAKE ANNUAL DIRECT AD VALOREM TAX LEVIES FOR THE DISCHARGE OF A PUBLIC DEBT, AND SPECIFICALLY RETAINED JURISDICTION OF THE CAUSE FOR THE PURPOSE OF REQUIRING THE OFFICIALS TO LEVY AND COLLECT THE TAXES, IS NOT A BANKRUPTCY DECREE WHICH RESTRAINS AND ANNULS ENFORCEMENT OF THAT JUDGMENT, AN INTERFERENCE WITH THE GOVERNMENTAL AND POLITICAL AFFAIRS OF THE STATE, PROHIBITED BY SECTION 83(c) OF THE BANKRUPTCY ACT?

II. WHERE THE STATE COURT IN 1937 DETERMINED THE RELATIONSHIP OF THE R.F.C. TO THE BANKRUPT AND TO THE PETITIONERS BY FINAL JUDGMENT, AND THEREIN DETERMINED THE R.F.C. HOLDS THE ORIGINAL BONDS "AS COLLATERAL SECURITY FOR A LOAN" AND THAT THE LOAN HAS BEEN PAID AS TO ALL OBLIGATIONS UP TO JANUARY 1, 1937, AND THAT THE DISTRICT HAS FUNDS TO PAY ITS DEBTS, IS NOT THE PLEA OF RES JUDICATA AVAILABLE IN A BANKRUPTCY COURT SO AS TO LIMIT THE CLAIM OF THE R.F.C. TO THE AMOUNT OF THE LOAN, AND TO MAKE ITS CONSENT AS HOLDER FOR FULL FACE VALUE OF THE ORIGINAL OBLIGATION A NULLITY?

As pointed out in the statement of factual background of the case (supra), the Superior Court of the State of California rendered several judgments wherein it adjudged that the district had no matured debt for which it did not have available funds to pay. This judgment was rendered after the enactment of the present bankruptcy act and long after the plan of composition was carried out to its present extent. In fact the decision of the Court is based upon the fact that the plan of composition had been carried out to such an extent as to eliminate a large portion

of the original indebtedness. This judgment we maintain is binding on the Bankruptcy Court and eliminates any possible finding of insolvency or inability to pay. Furthermore, it may be said that the Superior Court in rendering judgment was not unmindful of the bankruptcy proceeding, and its judgment was made in view of the possibility of a renewed attack upon petitioners here in the Bankruptcy Court. It flatly determined that it should retain jurisdiction of the public officers of the state and require them from year to year to levy assessments to pay petitioners' bonds. We respectfully submit that the Circuit Court erred in utterly disregarding and overruling these State Court judgments; the decree of the Bankruptcy Court interferes with the sovereign powers of the State of California to the extent of annulling its judgments and in effect directing its officers to levy assessments and collect taxes contrary thereto.

THIRD POINT: WHERE THE ORIGINAL CREDITORS SURRENDERED THEIR BONDS FOR THE ACCOUNT OR ORDER OF THE BANKRUPT UPON PAYMENT BEING RECEIVED FROM FUNDS LOANED BY THE R.F.C., ARE NOT THE ORIGINAL SECURITIES OWNED AND HELD BY THE BANKRUPT, SO AS TO PREVENT THEIR BEING COUNTED IN THE CONSENT, ESPECIALLY IN VIEW OF THE PLEA OF RES JUDICATA?

As shown in the recital of facts, the escrow instructions by which the original bondholders deposited and sold their bonds provided that the bondholders transferred title upon payment for their bonds directly to the irrigation district. It is submitted that the irriga-

tion district thus becomes the owner and holder of these bonds and that it could not apply for the benefits of the bankruptcy act as to them nor could it nor is it authorized to subsequently transfer title to such bonds to a third party for the purpose of enabling that third party to file a bankruptcy petition. (11 U.S.C.A. 403 (d).)

FOURTH POINT: IS A PLAN OF COMPOSITION FAIR WHERE LANDS WITHIN THE TAXING AGENCY HAVE ON THE MARKET VALUES VASTLY IN EXCESS OF THE DEBT, WHERE THE TAXPAYERS HAVE INDEPENDENT MEANS AND THE EVIDENCE SHOWS A STEADY GREAT INCREASE IN POPULATION?

The assessed value of the bare land without the improvements in this district amounts to $2,000,000; the bonded indebtedness sought to be composed was $1,700,000; the capital investment in this district is over $13,500,000; approximately 15,000 acres of the land in this district are worth in excess of $500 an acre or over $7,500,000; these lands are readily salable at the present time in spite of testimony about soil conditions at figures varying from $100 minimum for raw, unimproved land to $1250 for good orchards per acre. A great many of the homes in this district are held by persons who work in San Diego and own places and commute or come out over the weekend, leaving caretakers to take care of their estates. The trial Court's own finding confirms our point. "That while it is true that the number of homes in said district has increased from 646 in 1933 to 1615 homes in 1941, the majority of the persons owning said homes reside therein only over the weekend and obtain their

livelihood from other resources than the groves which they own, and that but very few of them earn their living from such groves." (R. 436.)

FIFTH POINT: IS A PLAN OF COMPOSITION FAIR WHICH ALLOWS ONE CREDITOR 100% OF HIS INVESTMENT IN BONDS BEARING INTEREST AT 4%, WHICH BONDS ARE VERY DESIRABLE SECURITY ON THE PRESENT DAY MARKET, WHILE IT REQUIRES PETITIONERS TO SURRENDER THEIR BONDS AND TAKE CASH?

There is a direct conflict between the decisions of the Ninth Circuit Court of Appeals and the decisions of the Fifth Circuit Court of Appeals on the question of whether a plan of composition which affords to one creditor bonds but denies those bonds to another creditor is fair. In the Ninth Circuit the decisions of the Court have held that there is no unfairness. (The instant case, and also *West Coast Life Ins. Co. v. Merced Irrigation District,* 114 Fed. (2d) 654.) On the other hand, in the Fifth Circuit in *State of Texas v. Tobasco Consolidated School Dist.,* 132 Fed. (2d) 62, 133 Fed. (2d) 196, 142 Fed. (2d) 58, the Court squarely held that such a plan is unfair.

As a matter of equity it must be so. These and similar four per cent tax exempt bonds are selling at enormous premiums on the market. The bonds of most of the districts whose plans of refinancing by 4% bonds were approved by the Ninth Circuit Court of Appeals are selling on the market to yield less than 3%, making big profits for the R.F.C. and its inside broker friends. It is respectfully submitted that it is grossly unfair to permit one creditor to receive these

bonds for the full amount of his investment and that another be required to take 55 cents in cash.

SIXTH POINT: WHERE THE BANKRUPT BORROWED MONEY FROM THE R.F.C. ON THE SECURITY OF ORIGINAL BONDS REPRESENTING THE INDEBTEDNESS TO BE COMPOSED, AND DURING THE PROCEEDINGS BUT BEFORE THE INTERLOCUTORY DECREE BECAME FINAL, THE BANKRUPT PAID THE R.F.C. IN FULL AND LIQUIDATED THE ORIGINAL INDEBTEDNESS WITH NEW MONEY BORROWED FROM PRIVATE BANKERS, IS NOT THE CASE MOOT, AND IS THERE NOT A FAILURE OF CONSENT OF THE MAJORITY BONDHOLDERS, AND SHOULD NOT THE WHOLE PROCEEDING BE SET ASIDE AND DISMISSED? IF NOT DISMISSED, DOES NOT THE SAVING MADE BY THE 3¼% BONDS BELONG TO THE CREDITORS?

When the Municipal Bankruptcy Act was re-enacted it was on the basis and theory of providing a Court procedure by which there could be a binding judgment upon the creditors, but the public debtor could never be bound until after it put up the consideration with the Court and had executed the plan. In consequence an interlocutory decree at most is only binding upon the consenting creditors. It merely gives an option to the debtor. There is no requirement that the debtor should put up the consideration and the debtor is at liberty to violate and abandon the whole plan, even after the entry of the interlocutory decree. It is only by the final decree that the discharge is granted and the composition plan is finally put into effect and confirmed. In the instant case the district, even before the interlocutory decree became final, and while it was on appeal, negotiated with private money lenders for a new loan of $780,000 at 3¼% interest, paid off

the R.F.C. and entirely liquidated the bonds upon which the consent was based and in fact, entirely liquidated the indebtedness involved in the bankruptcy proceeding. There is of course nothing to prevent a bankrupt from taking advantage of new and cheaper money, but we respectfully submit that when as here the debtor cancels and pays off the original indebtedness during the proceedings the debtor thereby renders the cause moot. The proceedings, we submit, should have been dismissed by the Circuit Court of Appeals upon the motion therefor by the petitioners. It is respectfully submitted further that the jurisdiction of the Court depended upon the consent of the creditors holding the original bonds, and in no sense can such consent survive the cancellation of the original bonds. The only cases which we have been able to find in other Circuits in any way construing this point are *Wright v. Coral Gables,* 137 Fed. (2d) 192, affirmed March 13, 1944, 64 S. Ct. 779, 321 U. S. 753, and the case of *Green v. City of Stewart,* 135 Fed. (2d) 33.

CONCLUSION.

It is submitted that a writ of certiorari should be granted, the decree of the Court below reversed and the proceedings directed to be dismissed.

Dated, Turlock, California,
October 16, 1944.

W. COBURN COOK,
Counsel for Petitioners.

(31)

Supreme Court, U. S.
FILED
NOV 24 1944
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 624

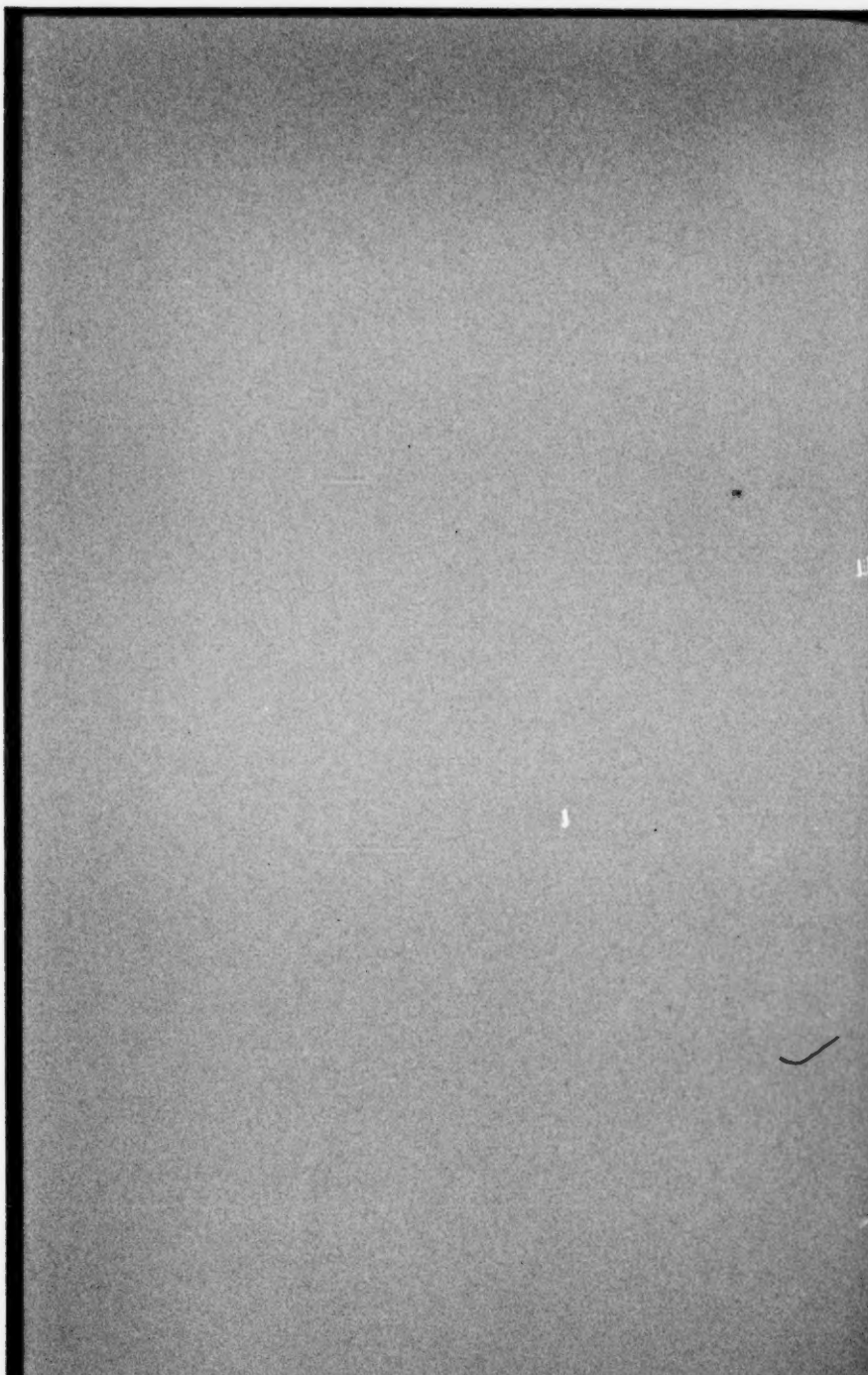
H. M. LORBER, ROY R. DEMPSTER, J. R. MASON, ARTHUR LORBER, FRANCES V. WHEELER, GILBERT MOODY, J. B. BLOOM, as Trustee of the Bloom Company, a Trust Estate, and STANLEY W. LANDIS,
Petitioners,

vs.

VISTA IRRIGATION DISTRICT,
Respondent.

BRIEF OF RESPONDENT OPPOSING ISSUANCE OF WRIT OF CERTIORARI

GLEN H. MUNKELT,
H. G. SLOANE,
Counsel for Respondent.



SUBJECT INDEX

Page

Petitioners Challenge Conclusions of Fact Based on Conflicting Evidence 2

State Decrees Were Properly Disregarded by the Bankruptcy Court 4

Circuit Court Decisions are Not in Conflict 5

The Plan Has Been in No Respect Abandoned But Has Been Substantially Performed 6

Opportunity, Subsequently Arising, to Carry Out the Plan With Cheaper Money, Does Not Vitiate the Plan 7

TABLE OF AUTHORITIES CITED

Page

Jordan v. Palo Verde Irrigation District, 114 Fed. 2d 691, Certiorari denied 61 S. Ct. 712, 312 U. S. 693, 85 L. Ed. 1129 2

Lorber v. Vista Irrigation District, 127 Fed. 2d 628, 143 Fed. 2d 282 3

Lorber v. Vista Irrigation District, 127 Fed. 2d 628 (10, 11, p. 637) 3

Lorber v. Vista Irrigation District, 143 Fed. 2d 282 3

McDonald v. Banta Carbona Irrigation District, 123 Fed. 2d 968, Certiorari denied 62 S. Ct. 1034, 316 U. S. 668, 86 L. Ed. 1743 2

Moody v. James Irrigation District, 114 Fed. 2d 685, Certiorari denied 61 S. Ct. 712, 312 U. S. 693, 85 L. Ed. 1129 2

Newhouse v. Corcoran Irrigation District, 114 Fed. 2d 690, Certiorari denied 61 S. Ct. 440, 311 U. S. 717, 85 L. Ed. 467 2

Taylor v. Provident Irrigation District, 123 Fed. 2d 965, Certiorari denied 62 S. Ct. 914, 315 U. S. 821, 86 L. Ed. 1217 2

Texas v. Tobasco Consolidated School District, 132 Fed. 2d 62, 133 Fed. 2d 196, 142 Fed. 2d 58 5

Texas v. Tobasco, 133 Fed. 2d 196 5

West Coast Life Ins. Co. v. Merced Irrigation District, 114 Fed. 2d 654, Certiorari denied 61 S. Ct. 441, 311 U. S. 718, 85 L. Ed. 467 2

West Coast Life Ins. Co. v. Merced, 144 Fed. 2d 654 (p. 667) 5

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 624

H. M. LORBER, ROY R. DEMPSTER, J. R. MASON, ARTHUR LORBER, FRANCES V. WHEELER, GILBERT MOODY, J. B. BLOOM, as Trustee of the Bloom Company, a Trust Estate, and STANLEY W. LANDIS,
Petitioners,

vs.

VISTA IRRIGATION DISTRICT,
Respondent.

BRIEF OF RESPONDENT OPPOSING ISSUANCE OF WRIT OF CERTIORARI

The courts of the Ninth Judicial Circuit of late years have had wide experience in applying the provisions of the Bankruptcy Act to compositions of bonded indebtedness of California irrigation districts. Distinguished counsel for the petitioners herein has

been active in many of these cases in the effort to procure interference by the Supreme Court of the United States in the pattern of application of law and fact arrived at by the United States Circuit Court of Appeals for the Ninth Circuit. This court has, however, repeatedly expressed its satisfaction with the decisions covering this particular field by denying certiorari.*

The present petition offers no new propositions of law as distinguished from questions of fact which petitioners seek to review. Respondent Vista Irrigation District opposes issuance of a writ of certiorari on this account and because its affairs have already been disrupted by repeated appeals by the petitioners since rendition of the interlocutory decree March 26, 1941.

PETITIONERS CHALLENGE CONCLUSIONS OF FACT BASED ON CONFLICTING EVIDENCE

Under their argument, 3rd point, 4th point, 5th point, and to some degree under 6th point, petitioners present their views of the evidence and the inferences and conclusions which they feel should be drawn therefrom.

---

*West Coast Life Ins. Co. v. Merced Irr. Dist., 114 Fed. 2d 654; Certiorari denied 61 S. Ct. 441, 311 U. S. 718, 85 L. Ed. 467;

Moody v. James Irr. Dist., 114 Fed. 2d 685; Certiorari denied 61 S. Ct. 712, 312 U. S. 693, 85 L. Ed. 1129;

Jordan v. Palo Verde Irr. Dist., 114 Fed. 2d 691; Certiorari denied 61 S. Ct. 712, 312 U. S. 693, 85 L. Ed. 1129;

Newhouse v. Corcoran Irr. Dist., 114 Fed. 2d 690; Certiorari denied 61 S. Ct. 440, 311 U. S. 717, 85 L. Ed. 467;

Taylor v. Provident Irr. Dist., 123 Fed. 2d 965; Certiorari denied 62 S. Ct. 914, 315 U. S. 821, 86 L. Ed. 1217;

McDonald v. Banta Carbona Irr. Dist., 123 Fed. 2d 968; Certiorari denied 62 S. Ct. 1034, 316 U. S. 668, 86 L. Ed. 1743.

Rather than to restate here the basic facts, Respondent refers to the excellent summary thereof made by the Circuit Court of Appeals and appearing in the published reports, *Lorber v. Vista Irrigation District,* 127 Fed. 2d 628 and 143 Fed. 2d 282.

These findings are challenged by petitioners along two basic lines: (1) That the evidence touching the financial and economic condition of the district does not support the finding of insolvency; (2) that the plan of composition is not a fair one in the light of such conditions.

After hearing numerous witnesses and examining voluminous accounts, the trial court found that the District was unable to meet its obligations as they mature. This finding was challenged on appeal, but the lower court's conclusions were fully sustained. *Lorber v. Vista Irr. Dist.,* 127 Fed. 2d 628 (10, 11, p. 637). On taking further evidence, the trial court held that the "ability of the District to pay" amounted to 55c on the dollar. This was vigorously challenged on a second appeal and insolvency was again argued. Again the Circuit Court upheld all findings of the trial court. *Lorber v. Vista Irr. Dist.,* 143 Fed. 2d 282.

Petitioners now propose that this court take upon itself the burden of reviewing and weighing the evidence appearing in volumes of statistics and accounts. At most it would be found that differing conclusions of fact might be drawn and abundant evidence would be discovered to support the conclusions drawn by the courts below.

STATE DECREES WERE PROPERLY DISREGARDED BY THE BANKRUPTCY COURT

Under First Point and Second Point petitioners seek to present a real question of law, their proposition being that where the state courts have rendered judgments requiring payment on account of district bonds, the relief offered such districts under the Bankruptcy Act is no longer available to them.

We apprehend that there are two fundamental answers to this:

First: *Res judicata* against all creditors who are concerned in a bankruptcy proceeding cannot arise from a proceeding on the part of any one of them alone against the debtor.

Second: A state judgment requiring payment of a debt has no higher standing in a court of bankruptcy than the debt itself (except for removing question of its validity, etc.). Thus a state decree requiring an irrigation district to collect funds and pay interest has no greater sanctity than a money judgment enabling collection on execution.

Obviously, the purpose of the Bankruptcy Statute may not be nullified by efforts of a creditor to collect his obligation in a state court.

CIRCUIT COURT DECISIONS ARE NOT IN CONFLICT

There is no conflict in the law as laid down by the Ninth Circuit Court decisions and that in *Texas v. Tobasco Consolidated School District,* 132 Fed. 2d 62, 133 Fed. 2d 196, 142 Fed. 2d 58. The factual backgrounds are distinguishable.

The cases decided upon appeal in the Ninth Circuit Court and tendered to the Supreme Court on petitions for certiorari (all denied) abundantly reflect the pattern of California irrigation district RFC financing. It is definitely held that no exchange of bonds is involved.

> *West Coast Life Ins. Co. v. Merced,* 144 Fed. 2d 654 (p. 667).

The Texas plan called for an outright "exchange" of bonds according to the definition adopted by the Fifth Circuit Court.

> *Texas v. Tobasco,* 133 Fed. 2d 196.

We take it that petitioners' implication (Brief, p. 22) that they are to get only 55c on the dollar, where RFC gets 100c in bonds, is inadvertent. Of course, the plan does not take into consideration what any bondholder may have originally paid for his bond. Adjustment is based in every case upon the face value of the bond.

THE PLAN HAS BEEN IN NO RESPECT ABANDONED BUT HAS BEEN SUBSTANTIALLY PERFORMED.

Petitioners indulge in blowing hot and blowing cold. Under their Fifth Point they argue that the plan provides delivery of new 4% bonds to RFC in exchange for old bonds, whereas petitioners are required to take their equivalent in cash. Yet, under their Sixth Point they demonstrate that RFC gets no new bonds, either 4% or otherwise!

The simple truth of the matter is that, after the plan was approved under the interlocutory decree, the District proceeded to carry it out to the best of its ability. In the succeeding interim petitioners enjoyed an appeal, a new trial on a single issue, an affirmance of the interlocutory decree and an unsuccessful appeal from that. No mandate ever issued suspending the plan or deferring its performance.

Performance has been completed in all respects except as relate to petitioners' bonds. RFC, the owner of the bulk of the bonds, was paid in cash 55c on the dollar (plus certain interest accruals), as the plan calls for. Petitioners' money awaits their acceptance on precisely the same terms and exactly in accordance with the plan.

We fail to grasp the logic by which it is claimed that such part performance of the plan operates as abandonment of it and renders the unperformed portion a moot subject!

If, on termination of this litigation, petitioners do not see fit to surrender their bonds and take payment on the same basis as did RFC, all that remains to be done is for the District to deposit their money in escrow pursuant to the provisions of the plan for recalcitrant bondholders, report the fact to the court and take the final decree.

OPPORTUNITY, SUBSEQUENTLY ARISING, TO CARRY OUT THE PLAN WITH CHEAPER MONEY, DOES NOT VITIATE THE PLAN.

Substantially the only new matter which petitioners seek to bring before this court, (beyond what has heretofore been offered on petitions for writ of certiorari), is the fact that Vista Irrigation District, after its plan had been accepted by bondholders and approved by the court, was able to obtain funds for refinancing at a rate of interest smaller than was originally contemplated. This was a "break" resulting from the delay of persistent litigation on the part of petitioners. Money became cheaper and the adoption and approval of the plan gave a more attractive appearance to the District's future.

The plan, as adopted and approved by the court, called for payment to each bondholder of 55c on the dollar, plus certain interest accruals. This was held to be a fair plan and commensurate with the ability of the District at the time.

If subsequent efforts had made money more expensive and had cast a more discouraging shadow on the future of the District, petitioners could not have been called upon to take any less in settlement than the 55c agreed upon. On the other hand, petitioners are in nowise prejudiced by the fact that the burden assumed by the District in order to pay them off has been slightly lightened. If any one could complain it would be RFC, which had something in the nature of an option to take the new bond issue. However, it does not complain.

Petitioners' position is no better or no worse than it would have been if some good angel had donated to Vista Irrigation District a sufficient sum to pay out under the plan and set the District on its feet again. In any event, whether with money procured from RFC or money procured from private bankers or money procured by donation for the purpose, petitioners are in position to receive for their old bonds exactly what the other bondholder, RFC, received for its old bonds and exactly in the amount specified in the plan.

We respectfully submit that there is neither occasion for nor subject matter appropriate to review by the Supreme Court of the United States.

GLEN H. MUNKELT,
H. G. SLOANE,
Counsel for Respondent
Vista Irrigation District.